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ANG BAN GIAP v. WORLDWIDE HOLDINGS BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY J
[SUIT NO: 22NCVC-697-12-2016]
13 AUGUST 2018

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CONTRACT: *Agreement – Sale and purchase agreement – Defects in building – Claim for rectification costs – Interpretation of clause in sale and purchase agreement – Whether plaintiff could claim rectification costs from stakeholder sum – Whether claim could be made based on quotation of costs that would be incurred – Whether claim could only be made after carrying out rectification works*

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Vide a sale and purchase agreement ('SPA'), the plaintiff entered into an agreement with the first defendant ('D1') to purchase a double storey bungalow house sold by D1. Upon delivery of vacant possession of the house to him, the plaintiff alleged that there were several defects found in the construction of the house. The plaintiff then sent a written notice to D1 regarding the defects. D1 however, failed to repair and make good those defects within the specified duration. Subsequently, the plaintiff gave D1 a quotation prepared by a contractor for costs of repairs in the sum of RM143,920 and informed D1 of the plaintiff's intention to repair the defects himself pursuant to cl. 25(2) of the SPA and make the appropriate claim thereafter. The second defendant ('D2') was D1's solicitor appointed to hold 5% of the purchase price, *ie* RM102,795.70, as stakeholder under the terms of the SPA. The plaintiff, without rectifying the said defects pursuant to cl. 25(2), of the SPA proceeded to claim against the stakeholder sum held by the D2 as trustee for the plaintiff and D1. It was the contention of D1 and D2 that the plaintiff had a contractual obligation to carry out the rectification works as soon as practicable after D1 had failed to carry it out and the plaintiff could only make a claim for the stakeholder sum from D2 if the rectification works had been completed pursuant to cl. 25(2) of the SPA. In opposing this proposition, the plaintiff contended that the cost envisaged in cl. 25(2) that was recoverable from the stakeholder sum held by D2 need not be the actual costs but a quotation of the costs that would be incurred to carry out the repair costs. The issues that arose for consideration, *inter alia*, were (i) whether pursuant to cl. 25(2) of the SPA, the plaintiff was entitled to claim for costs of repair from the stakeholder sum; and (ii) whether D2 had failed to carry out its obligations as the stakeholder by failing or refusing to release the stakeholder sum to the plaintiff.

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Held (dismissing plaintiff's claim):

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(1) The key words 'recover' and 'deduct' in the cl. 25(2) were sufficiently clear in their meaning that the plaintiff needs to complete the rectification works first, before he was entitled to recover and deduct the

cost of repairing and making good the defects, shrinkages or other faults from the sum held by D2 as stakeholder for D1. As such, giving effect to the plain and ordinary meaning of cl. 25(2) of the SPA, it followed that the plaintiff would only be entitled to claim the stakeholder sum, upon ascertaining or proof of, the actual costs incurred for the remedial works. In the circumstances, the plaintiff was not entitled to claim from the stakeholder sum prior to the completion of the rectification works and D1 was not liable to pay for the balance of the rectification works in the sum of RM23,124.30. (paras 53, 55 & 56)

(2) As trustee for both the vendor (D1) and the purchaser (plaintiff) D2's primary duty was to safeguard the rights and interests of both parties. Accordingly, D2 had rightly adhered to his obligations as a stakeholder and acted in accordance with cl. 25(2) of the SPA as the plaintiff's claim was in conflict with its express terms and condition which had to be strictly complied with before D2's obligation to release the stakeholder sum arose. In the circumstances, D2 had not failed to discharge his obligations as a stakeholder in not releasing the stakeholder sum as demanded by the plaintiff, the issue of D2's liability to pay damages to the plaintiff had become a non-issue. Similarly, if the plaintiff's claim for release of the stakeholder's sum was founded on trust law the factual matrix of this case did not support the allegation of breach of trust as D2's refusal to release the said sum to the plaintiff was not deliberate or intentional but due to D1's refusal to give consent and purported non-compliance by the plaintiff himself with cl. 25(2) of the SPA. (paras 59, 60 & 62)

(3) The established principle of interpretation is that where the words of a contract are clear and unambiguous, the court must adopt a literal interpretation of the words to ascertain the meaning. As parties to a contract are bound by its terms which are explicit and unambiguous, the intention or object of the Legislature in enacting the Housing Developers Act is secondary. Accordingly, the plaintiff had failed to prove his pleaded claim and cause of action for breach of contract by D1 and breach of trust by D2 on a balance of probabilities. (paras 68 & 71)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Pembinaan Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2011] 1 LNS 1769 CA ***(refd)***

Syarikat Binaan Utara Jaya (A Firm) v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tan Poh Yee v. Tan Boon Thien & Other Appeals [2017] 3 CLJ 569 CA ***(refd)***

Legislation referred to:
Housing Development (Control and Licensing) Regulations 1989, Schedule G
Interpretation Acts 1948 and 1967, s. 17A

For the plaintiff - Su Wan Ying & Ho Sook Cheng; M/s Wilson Wong & Tan
For the defendant - Razali Md Nor & Abdul Razak Abu Bakar; M/s Ahmad Fuad Amin & Partners

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy J:

[1] The plaintiff purchased a bungalow house sold by the developer (first defendant). Upon delivery of vacant possession of the house to him, the plaintiff alleged that there were several defects found in the construction of the house and that, despite complaints being made to the first defendant ('D1'), D1 failed to rectify the defects in breach of cl. 25 of the sale and purchase agreement ('SPA') that they had entered into. Thereafter, the plaintiff, without rectifying the said defects pursuant to cl. 25(2) SPA, proceeded instead to claim against the stakeholder sum held by the second defendant solicitors ('D2') as trustee for the purchaser and vendor ('plaintiff and D1'). *Vide* this claim the plaintiff prayed for the following declaratory and consequential orders:

(a) A declaratory order that the first defendant has failed to build the said house in a good and workmanlike manner and there are defects, shrinkages or other faults after the delivery of vacant possession;

(b) A declaratory order that the first defendant has failed, refused and/or neglected to repair and make good the defects, shrinkages and/or faults to the said house pursuant to cl. 25 of the sale and purchase agreement;

(c) A declaratory order that the first defendant is liable to pay the rectification cost amounting to RM143,920;

(d) A declaratory order that the second defendant as trustee to release the stakeholder sum held by the second defendant amounting to RM102,795.70;

(e) The first defendant shall pay the balance of rectification cost amounting to RM23,124.30;

(f) Interest on the sum of RM102,795.70 at the rate of 5% per annum to be paid by second defendant;

(g) General damages to be paid by the defendants; and

(h) Costs.

Summary Of Facts

[2] Briefly, the material facts are these. *Vide* a sale and purchase Agreement ('SPA') dated 3 April 2013, the plaintiff ('P') entered into an agreement with D1 to purchase a piece of land held under HS (D) 232214, PT40302, Mukim Sg Buloh, Daerah Petaling, Negeri Selangor with a double storey bungalow house on the said land in a development project known as Subang Bestari Zone 5B.

[3] The second defendant ('D2') is the first defendant's (D1's') solicitor appointed to hold 5% of the purchase price, ie, RM102,795.70, as stakeholder under the terms of the SPA.

[4] Amongst the terms of the SPA are the following:

(a) Purchase price of RM2,055,914.

(b) Purchase price is payable by the plaintiff to D1 in instalments under the third Schedule of SPA.

(c) Clause 5 of third Schedule provides that 5% from the purchase price, ie, RM102,795.70 is payable by the plaintiff to D1 on the date of delivery of vacant possession. The said sum is held by D1's solicitors as stakeholder.

(i) 2.5% of stakeholder sum will be released to D1 8 months after the date of delivery of vacant possession.

(ii) 2.5% of stakeholder sum will be released to D1 24 months after the date of delivery of vacant possession.

(d) The house is to be constructed in a good and workmanlike manner as per Schedule 4 of the SPA.

[5] Upon delivery of vacant possession to the plaintiff, he discovered that the workmanship quality and materials used for the house were defective.

[6] On 20 May 2014, the plaintiff sent a written notice to D1 regarding the defects. D1, however, failed to repair and make good those defects within 30 days of D1 having received the written notice.

[7] On 5 August 2014, the plaintiff gave to Dl a quotation prepared by a contractor, one Syarikat Tuahbina, for costs of repairs in the sum of RM143,920 and informed D1 of the plaintiff's intention to repair the defects himself pursuant to cl. 25(2) of the SPA and make the appropriate claim thereafter.

Agreed Facts Between The Plaintiff And D1

[8] D1 is a licensed housing developer company with its registered and business address at No. 1, Worldwide @ 7, Lot 24, Jalan Lazuardi 7/29, Seksyen 7, 40000 Shah Alam, Selangor Darul Ehsan.

[9] *Vide* SPA dated 3 April 2013, DI had sold and the plaintiff had purchased a land held under individual title H.S.(D) 242214, P.T. 40302, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ('the land') together with a two storey bungalow house which is to be built on the land ('house') under a housing project known as Subang Bestari Zone 5B ('project') which was developed by D1 with the purchase price of RM2,055,914 ('purchase price').

[10] The plaintiff has paid the full purchase price to D1 including the stakeholder's sum of RM102,795.70 ('stakeholder's sum') which was paid by the plaintiff's financier, Public Bank Berhad, to D2 as stakeholder in accordance with the terms provided in the SPA.

[11] D1 delivered vacant possession of the house to the plaintiff by a letter dated 9 January 2014.

[12] On 20 May 2014 the plaintiff complained to D1 regarding defects, shrinkages and/or faults to the house and enclosed a list of complaints of defects, shrinkages and/or faults to D1.

[13] D1 has failed to repair the defects, shrinkages and/or faults to the house as complained by the plaintiff within the period of 30 days from the date of the complaint.

[14] On 5 August 2014, the plaintiff sent to D1 a quotation in the amount of RM143,920 which was prepared by the contractor, one Tuahbina, for the repair works to the house.

[15] The plaintiff has given several reminders to D1, including a letter dated 22 July 2014 personally and also a letter dated 28 August 2014 *vide* the plaintiffs solicitor, ie, Messrs. Wilson Wong & Tan.

[16] D1 has failed to repair and make good the said defects, shrinkages and/or faults to the house within 14 days after the plaintiff had informed D1 regarding the plaintiff's intention to carry out repairs and rectification works in respect of the defects, etc. to the house by himself.

[17] D1 returned the keys of the said house to the plaintiff on 24 October 2014.

[18] The plaintiff's solicitors received D1's solicitors' letter dated 22 January 2016 and revised estimated cost in the sum of RM22,988 which was enclosed with the said letter.

Agreed Facts Between The Plaintiff And D2

[19] D2 is a firm of solicitors with one of its branches at E-08-03, Jalan SS 15/4, Subang Square, 47500 Subang Jaya, Selangor Darul Ehsan.

[20] D2 are D1's solicitors who were appointed solely to hold 5% of the purchase price which amounts to RM102,795.70 as stakeholder but D2 is not the firm of solicitors representing the plaintiff or D1 under the SPA.

[21] The plaintiff by his Financier, Public Bank Berhad, had paid the stakeholders' sum of RM102,795.70 according to the terms of the SPA to D2 as stakeholder.

[22] The plaintiff had issued several letters of demand through the plaintiff's solicitors dated 30 October 2014, 9 January 2015 and 14 April 2015 to D2:

(a) informing D2 regarding the failure by D1 to repair and make good the said defects, shrinkage and/or faults in accordance with the terms in the SPA; and

(b) demanded from D2 the sum of RM102,795.70 from the stakeholders sum held by D2 as stakeholder for the plaintiff and D1 as costs of repair and rectification of the defects, shrinkage and/or faults to the house in accordance with the terms of the SPA,

[23] D2, *vide* their letter dated 15 April 2015, had refused to release the stakeholder sum or any part of the sum to the plaintiff on the instructions of D1.

Agreed Issues To Be Tried

[24] Whether pursuant to cl. 25(2) of the SPA, the plaintiff is entitled to claim for costs of repair from the stakeholder sum which is held by D2 before the plaintiff has fully completed the said rectification works at his own cost?

[25] Whether cost in the phrase "vendor's solicitors shall release such cost to the purchaser from the stakeholder sum held" under cl. 25(2) of the SPA refers to the cost stated in the contractor's quotation given by the plaintiff to D1 or the actual cost that has been incurred by the plaintiff to rectify the defects, shrinkages and/or defaults to the house?

[26] Whether D1 is liable to pay the remainder rectification costs amounting to RM23,124.30 to the plaintiff?

[27] Whether D2 has failed to carry out its obligations as the stakeholder by failing or refusing to release the stakeholder sum to the plaintiff upon D1's instruction?

[28] If D2 has failed in carrying out its obligations as the stakeholder to release the stakeholder sum as demanded by the plaintiff, whether the plaintiff is entitled to claim for damages against D2 since there is no privity of contract between the plaintiff and D2?

Plaintiff's Case Against D1

[29] D1 has failed to build the said house in a good and workmanlike manner and there are defects, shrinkages and/or fault that had become apparent within 24 months after the date of delivery of vacant possession of the house;

[30] After the plaintiff's defects complaint and the contractor's quotation were given to D1, D1 had failed, refused or neglected to carry out repair works of the defects, shrinkages and/or faults to the house pursuant to notices under cl. 25 of the sale and purchase agreement in two of the following durations:

(a) 30 days from the defect complaint form made by the plaintiff on 20 May 2014 to the D1; and

(b) 14 days after the said contractor's quotation given to D1 on 5 August 2014 (hereinafter referred to as the said "two durations")

[31] D1 had breached cl. 25 of the said sale and purchase agreement by failing, refusing or neglecting to repair and rectify the defects, shrinkages, etc. to the said house within the said two durations.

[32] D1 is liable to the plaintiff for the defects, shrinkages, etc.

[33] Plaintiff has suffered losses for the enjoyment and residing of the said house.

Plaintiff's Case Against D2

[34] The plaintiff's summary of case against D2 is as follows:

(a) Instances to permit D2 to release the said stakeholder sum, to the plaintiff pursuant to the sale and purchase agreement have happened ie, the D1 has failed to take any action to repair the defects, shrinkages and/or deficiencies of the said house within the said two durations.

(b) D2 has breached its duties as the stakeholder to the plaintiff and D1 pursuant to the said sale and purchase agreement for refusing to release the stakeholder sum to the plaintiff when claimed;

(c) D2 has failed to take any action including interpleader summons to take the court's direction relating to the management of the said stakeholder sum.

Defence Case

D1

[35] D1's defence is as follows:

(a) D1 denies the allegation of complaints of defects, shrinkages and/or faults of the said house by the plaintiff where there are irrelevant complaints made;

(b) The plaintiff's claim is irrelevant, excessive and/or the claim, for cost of repairs is exorbitant and some of the claims are not listed in the plaintiff's complaint form;

(c) Due to the dispute as to the defects, shrinkages and faults of the said house and the actual cost of repairs, D1 could not accede to the plaintiff's claim; and

(d) The plaintiff should have done the repair work first before claiming for the stakeholder sum held by D2. The plaintiff's claim is, therefore, premature;

[36] The second defendant's defence is as follows:

(a) The release of the stakeholder money could only be made if there is no dispute of claim between the plaintiff and first defendant.

(b) The first defendant had informed the second defendant:

(i) That the first defendant is not agreeable to the plaintiff's claim on the stakeholder sum because the first defendant denies the allegation of defects, shrinkages and/or fault of the said house and the cost of repairs;

(ii) Plaintiff has failed to amend the allegation of defects before claiming;

(c) The second defendant has no privity of the contract with the plaintiff.

Analysis Of Evidence And Findings

[37] The primary issue on which the outcome of this case turns is whether the plaintiff had proved his claim as per the particulars of his pleaded cause of action against D1 and D2.

[38] As per the submission of his counsel, the plaintiff (PW2) relied on the following documentary evidence to make out his case:

(a) Exhibit P1, which is a letter dated 21 July 2017 from a building contractor known as Tuahbina Sdn. Bhd. ('T13') enclosing a quotation for the sum of RM143,920 for remedial works for the defects, shrinkages and/or faults to the said bungalow ('subject property');

(b) PW1, the proprietor of TB produced the original of P1, of which he confirmed to have been the maker;

(c) Exhibit P2, which is a set of photographs taken by PW3 apparently showing the above defects etc.; and

(d) Exhibit P3, another set of photographs taken by PW3 purportedly showing that remedial works to the subject property had been carried out.

[39] It was then contended by the plaintiff that by virtue of the above documentary evidence, his claim as pleaded had been proved on a balance of probabilities. *Inter alia*, P2 pointed out that the defects complaint form had been served on D1 on 20 May 2014, the receipt of which was admitted and agreed to by D1. Secondly, that PW1 had upon inspection of the subject property, prepared the list of defects (exh. P2) which was also confirmed by PW3, who took photographs of the same and P2 proved the defects. Thirdly that D1 had admitted having failed to act on the plaintiff's complaint of defects within the 30 day period from the complaint contrary to cl. 25 of the SPA. D1 had also been served the quotation by TB in the sum of RM143,920 on 5 August 2014 which D1 admitted.

[40] D1 further agreed that they had failed to remedy the defects complained of within 14 days from the date that PW2 had expressed his intention to carry out the remedial works himself as provided for in cl. 25 of the SPA.

[41] It was contended that on the whole, D1 had failed to prove which of the defects on the list of complaints had been rejected and which had been agreed to by D1 based on the evidence of D1's material witnesses. Importantly, D1, through its witnesses – DW3 (architect), DW5 (D1's Project Executive) and DW5 (D1's site supervisor) – had clearly failed to identify which of the complaints of defects had been accepted and which had been rejected. DW3, who was entrusted by D1 to decide on the remedial works, was unable to identify which of the defects required repairs and which did not. Neither could DW5 do so.

[42] The plaintiff also pointed out that DW5 when cross-examined admitted that he could not produce any documents or evidence of communication with PW2 notifying him that any of his complaints of defects had been rejected. DW6, in cross-examination, admitted that he had been instructed to repair all the defects complained of by PW2. As contended, right up to the time this claim was filed, D1 was fully aware of PW2's list of defects and did not formally notify PW2 of the rejection of any of the complaints on the list.

[43] To conclude his case against D1, PW2 contended that *via* the evidence of PW3 he had, through the photographs tendered, proved that he had begun remedial works on 9 April 2015 which would entitle him to claim from the stakeholder sum.

[44] As regards D2, it was not disputed that D2 had acknowledged receipt of PW2's claim for the stakeholder sum made through his solicitors' letters, amongst which the letter dated 14 April 2015 notified D2 that the plaintiff had begun remedial works to the subject property. PW2 highlighted the evidence of DW2, witness for D2 and a partner in the firm, in cross-examination where he admitted that when he rejected PW2's claim for

release of the stakeholder sum, he could not confirm whether PW2 had begun or completed the remedial works. In any event, it was not an issue in regard to D2's rejection of PW2's claim. In addition, DW2 did not deny having knowledge that the requisite notices under cl. 25 of the SPA had been served on D1 who failed to respond to the same by repairing the defects that were brought to its attention.

[45] Lastly, PW2 claimed to have proved that he had suffered losses and damages resulting from D1's failure in its obligation to remedy the defects. As a result, PW2 could not occupy and enjoy the use of the new bungalow house with his family. It was allegedly aggravated by D2's refusal to release the security deposit whereas PW2 continued to be liable to pay exorbitant interest to his financier.

[46] In essence, the outcome of this suit basically turns on the answers to issues (a) and (b), in particular as to the correct construction to be given to cl. 25(2) as to the obligations and rights of the vendor and the purchaser spelt out therein. It would be useful for ease of reference to reproduce below cl. 25(1) and (2) of the SPA:

> 25. Defect Liability Period
>
> (1) Any defect, shrinkage or other faults in the said building which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Building and which are due to defective workmanship or materials or, the said building not having been constructed in accordance with the plans and description as specified in the Second and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of the Vendor having received written notice thereof from the Purchaser.
>
> (2) If the said defect, shrinkage or other faults in the said Building have not been made good by the Vendor within the said period of thirty (30) days under subclause (1), the Purchaser shall be entitled to carry out the works to repair and make good the said defect, shrinkage or other faults himself and "to recover" from the Vendor the costs of repairing and making good the same and the Purchaser may deduct such cost from any sum which has been held by the Vendor's solicitors as stakeholders for the Vendor under item 5 of the Third Schedule provided that the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the costs of repairing and making good the said defect, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works and provided

A further that the Purchaser shall carry out and commence the said works as soon as practicable after the Vendor's failure to carry out the said works within the said fourteen (14) days. in such an event, the Vendor's solicitor shall release such costs to the Purchaser from the stakeholder sum held by the Vendor's solicitors under item 5 of the Third Schedule within fourteen (14) days after receipt by the B Vendor's solicitors of the Purchaser's written demand specifying the amount of such costs.

[47] It is the contention of D1 and D2 that the plaintiff has a contractual obligation and is required to carry out the rectification works as soon as practicable after D1 had failed to carry it out within 14 days from the date C of receiving the second notice from the plaintiff and the plaintiff could only make a claim for stakeholder sum from D2 if the rectification works have been completed as supported by the last sentence in cl. 25(2) of the SPA. In other words, that the cost of repairing and making good the defects, shrinkage and other faults is in reference to the actual cost incurred by the plaintiff after D the completion of the rectification works.

[48] In opposing this proposition, the plaintiff contended that the cost envisaged in cl. 25(2) above that is recoverable from the stakeholder sum held by D2 need not be the actual costs but a quotation of the costs that would be incurred to carry out the repair costs.

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[49] To resolve this vital issue, it is important to bear in mind the principles relating to the interpretation of contracts. It is trite law that in the construction of a contract, the court must give effect to the plain and ordinary meaning to the words used if the same are unambiguous and clear when read literally. Reference can be made to the Court of Appeal case of *Syarikat* F *Binaan Utara Jaya (A Firm) v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 AMR 50 where Abdul Malik Ishak JCA made the following propositions:

(a) the Court must give effect to the plain meaning of the words, no G matter how distasteful the result may be (*The Central Bank of India Ltd Amritsar v. The Hartford Fire Insurance Co Ltd* [1965] AIR Vol 52, 1288 SC);

(b) where the language in the document is unambiguous and clear, the real nature of the document is to be determined solely by looking at its contents, uninfluenced by any intention of the parties (*(Nawab* H *Major Sir) Mohammad Akbar Khan v. Attar Singh & Others* AIR [1936] AIR Vol 23 171 PC);

(c) when the minds of the parties are expressed in an unambiguous manner, the court cannot override the declared intention of the parties unequivocally expressed (*K Appukuttam Panicker & Another v.* I *S.K.R.A.K.R. Athappa Chettiar & Others* [1966] AIR Vol 53, 303 Kerala); and

(d) there is no scope, at all, for drawing upon hypothetical considerations or the supposed intention of the parties when the words contained in the contract are clear and unambiguous (*The Union of India v. Kishorilal Gupta and Bros* [1959] AIR Vol 46, 1362 SC).

[50] In a subsequent Court of Appeal case, *Pembinaan Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2011] 1 LNS 1769; [2012] 4 MLJ 774 the established principle was expressed as follows:

> We entirely agree that courts must give effect to the plain meaning of words, where words are clear and unambiguous. "It boils down to this. Where a contract is couched in unambiguous language, the court must give effect to it ..." (*Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587; [1997] 1 CLJ 23 at 53, per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). But to arrive at the interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the documents (*Chamber Colliery Ltd v. Twyerould* [1915] 1 Ch 268).

[51] The plaintiff further contended as the SPA was a statutory agreement based on Schedule G of the Housing Development (Control and Licensing) Regulations 1989, which was a subsidiary legislation under the Housing Development (Control and Licensing) Act 1966 the correct and established principles of interpretation of statutes are applicable to the interpretation of cl. 25 of the present SPA. In the event that cl. 25(2) is found by the court to be vague or unclear as to whether only the actual costs of rectification can be released by the stakeholder to the purchaser, the plaintiff proposed that s. 17A Interpretation Acts 1948 and 1967, which provides as follows should be invoked:

> 17A. Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[52] As to the principles governing the correct approach to be adopted in the interpretation of statutes, reference was made to the Federal Court case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 where Augustine Paul FCJ remarked, *inter alia*, as follows:

> In order to appreciate the scope of s. 17A it is perhaps useful to refer to the judgment of the House of Lords in *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 All ER 113 where Lord Bingham said at pp 118-119:
>
> ...

Lord Steyn said at pp 122-123:

> The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Comrs v. Adamson* [1877] 2 App Cas 743 at 763, [1874-801 All ER Rep 1 at 11. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, eg social welfare legislation and tax statutes may have to be approached somewhat differently.

In summarising the principles governing the application of the purposive approach to *Interpretation, Crates on Legislation* 8th edn says at p. 566:

> (1) Legislation is always to be understood first in accordance with its plain meaning.
>
> (2) Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
>
> (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
>
> (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

(See also *Tunku Yaacob Holding Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 (FC) and *Veronica Lee La Lino & Ors v. Maxiseoar Sdn, Bhd* [2011] 2 MLJ 141 (FC)).

[53] Having scrutinised the words and language used in the material parts of cl. 25(2), SPA pertaining to the issue at hand, I upheld the contention made on behalf of the defendants that the key words 'recover' and 'deduct' in cl. 25(2) are sufficiently clear in their meaning that the plaintiff needs to complete the rectification works first, before he is entitled to recover and deduct the cost of repairing and making good the defects, shrinkages or other faults from the sum held by D2 as stakeholder for D1 under item 5 of the Third Schedule of the sale and purchase agreement."

[54] This contention is well supported by the dictionary meaning of the word "recover" which is "to get back something lost or spent" (See *Cambridge International Dictionary of English*). A

[55] As such, giving effect to the plain and ordinary meaning of cl. 25(2), SPA, it followed that the plaintiff would only be entitled to claim the stakeholder sum, upon ascertaining or proof of, the actual costs incurred for the remedial works. In his statement of claim ('SOC') the plaintiff himself admitted his contractual obligation under cl. 25(2) when he pleaded that he had commenced works to repair the defects, shrinkages etc. at his own cost but qualified in his reply to D1's defence that he had commenced but not completed the remedial works yet due to being unable to bear the high costs. However, as pointed out by D1, PW2 gave evidence that was inconsistent with the facts pleaded when he testified that he had 'only repaired the roof to prevent water leakages but did not proceed with the rest of the remedial works. B C

[56] In view of my finding on issues a) and b), it followed that as regards issue c) the plaintiff was not entitled to claim from the stakeholder sum prior to the completion of the rectification works and D1 was not liable to pay for the balance of the rectification works in the sum of RM23,124,30. D

[57] Going on to issue d) involving D2 (DW2), his version as per his testimony was that he was bound by the terms of his appointment, which, in gist, were that the release of the stakeholder sum was subject to the consent or approval of D1 when there was no dispute on the complaint of defects and rectification costs together with compliance by the purchaser (PW2) with cl. 25(2) of the SPA in carrying out the rectification works first before making the claim. DW2 also testified that in view of the issues and/or dispute between the plaintiff and D1 he had been instructed by the latter not to release the stakeholder sum as yet to the plaintiff *vide* letter dated 20 April 2015 (exh. D4). E F

[58] DW2 took the position that is as a solicitor acting as a stakeholder, he was bound by the terms of his appointment, particularly in regard to the terms and conditions (T&C') of cl. 25(2), SPA. Flowing from the dispute between the plaintiff and D1 on the issue of defects and the rectification costs, PW1's stand was that he could not release the stakeholder sum to P as D1 had instructed him not to do so until the matter was resolved. As regards his role as stakeholder, D1 also relied on ruling 14.10(3) of the Bar Council Malaysia Ruling which stipulates that: G H

> A solicitor acting as stakeholder for 2 or more parties must strictly adhere to the terms of the stakeholding at all times. No money or document held by a Solicitor as stakeholder shall be released, utilized, applied or otherwise dealt with such Solicitor except in accordance with the terms of the stakeholding or with the express written consent of all relevant parties. For example, a Solicitor holding the final 5% of the purchase price I

A under a sale and purchase agreement prescribed by the Housing Development (Control and Licensing) Regulation 1989 must not (for whatever reason) release the same before the expiry of the stakeholding period(s) and/or in contravention of Schedule G Agreement or Schedule H Agreement as the case may be.

B **[59]** In light of the circumstances of this case and the Bar Council Ruling, D2 was, in my view, right in contending that as trustee for both the vendor ('D1') and the purchaser (plaintiff) D2's primary duty was to safeguard the rights and interests of both parties. Accordingly, D2 had rightly adhered to his obligations as a stakeholder and acted in accordance with cl. 25(2) of the SPA as P's claim was in conflict with its express T and C which had to be strictly complied with before D2's obligation to release the stakeholder sum arose.

[60] In regard to issue e), as I have found that D2 had not failed to discharge his obligations as a stakeholder in not releasing the stakeholder sum as demanded by the plaintiff, the issue of D2's liability to pay damages to P has become a non-issue. In any event, D2 correctly took the position that there was no question of the plaintiff being entitled to claim for damages against D2 for breach of contractual obligations as there was undisputedly no privity of contract between these two parties.

E **[61]** In support of this proposition, D2 relied on the Court of Appeal case of *Tan Poh Yee v. Tan Boon Thien & Other Appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244 where it was held:

> The fundamental principle of law on this point has been constantly followed and repeated by our courts that only a party to a contract can sue on it and only the parties to a contract has enforceable rights and obligations under such contract. We may categorically state, as an extension to this principle, that no stranger to the consideration can take advantage of a contract, although made for his benefit. We shall, in this regard, refer to the case of *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284 wherein Abdul Malik lshak JCA handing down the judgment of this court said at pp 307308:
>
> [67] After *Tweddle v. Atkinson*, the doctrine of privity was firmly established as part and parcel of the English common law in the case of *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 (HL). There, Viscount Haldane LC aptly said at p 853:
>
> [70] As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, 'no one but the parties to a contract can be bound by it or entitled under it' (*Greenwood Shopping Plaza Ltd v. Beattie* [1980] 2 SCR 228 at p 229).

F G H I

[62] Similarly, if the plaintiffs claim for release of the stakeholder's sum is founded on trust law, the factual matrix of this case does not support the allegation of breach of trust as D2's refusal to release the said sum to the plaintiff was not deliberate or intentional but due to D1's refusal to give consent and purported non-compliance by the plaintiff himself with cl. 25(2) of the SPA. This fact effectively demolishes the allegation of breach of trust against D2.

[63] Considering the above finding on the principal issues, there is no further necessity to deal with the consequential or subsidiary issues that are non-agreed among the parties.

Conclusion

[64] I have duly considered the evidence of the plaintiff ('P') and the defendants ('Dl and D2') as a whole and read the pleadings and submissions of both parties. My findings on the core issues are in gist as follows.

[65] This claim is for alleged breach of contract by D1 and breach of trust by D2 as a stakeholder. The contract in question is the sale & purchase agreement ('SPA') of the subject property entered into between P and D1.

[66] There is no dispute that there were defects in the construction of the subject building within the defect liability period ("DLP') for which written notice had been given to the vendor ('D1') and that the defects were not made good by D1 within 30 days of a notice served in accordance with cl. 25(1) of the SPA. In the event of default by the vendor under cl. 25(1), the remedy of the purchaser (P) is under cl. 25(2) of the SPA, which is the basis of P's cause of action for breach of contract. The alleged breach is the failure of D1 solicitors (D2) to release the cost of the repair works to P from the stakeholder sum.

[67] In essence, the outcome of this case depends substantially on whether the purchaser ('P') has a contractual obligation to commence and carry out the rectification works and complete the same before making a claim for the stakeholder sum?

[68] The established principle of interpretation is that where the words of a contract are clear and unambiguous, the court must adopt a literal interpretation of the words to ascertain the meaning. As parties to a contract are bound by its terms which are explicit and unambiguous, the intention or object of the Legislature in enacting the Housing Development Act is secondary.

[69] In the instant case, P has only served a quotation for the repair works on D1 and D2. There is insufficient evidence of the works having been commenced as soon as practicable and clearly, the rectification works have to date not been completed. Apart from the contractor appointed by P having produced an estimated cost of repairs or quotation, he was admittedly not even appointed to carry out the actual works.

[70] After having carefully read the terms of cl. 25(1) & (2) of the SPA and considered the contentions of both counsel and the authorities, I uphold the first defendant's contention that the plaintiff is entitled to make a claim for the stakeholder's sum only if P fulfils his contractual obligation to carry out and complete the rectification works. Merely submitting a quotation of the cost of rectification which has yet to properly commence will not suffice to make a valid claim under cl. 25(2) which requires P to show the actual cost of rectification incurred. The court's finding is based on a literal reading and construction of cl. 25 as a whole, the intention of which is clear from the express words used.

[71] For the foregoing reasons, and all the matters adverted to, I find that P has failed to prove his pleaded claim and cause of action for breach of contract by D1 and breach of trust by D2 on a balance of probabilities. Accordingly, the claim against the defendants as pleaded has no basis on the facts and evidence and in law.

[72] In conclusion, I dismiss P's claim against D1 and D2 with costs to be fixed.

[73] Costs of RM20,000 awarded to D1 and D2.